STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2014
v	No. 315371 Osceola Circuit Court
BLAKE DANIEL HULLIHEN, Defendant-Appellant.	LC No. 12-004665-FC

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms 37½ to 75 years' imprisonment for each second-degree murder conviction, and two years' imprisonment for each felony-firearm conviction, with 449 days credit, consecutive to the murder sentences. Defendant appeals as of right. We affirm.[1]

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of the shooting deaths of Gabrielle Woodworth and Donald Feneis. Woodworth was defendant's former girlfriend and the mother of his daughter, and Feneis was Woodworth's boyfriend at the time of the shooting. Both victims were shot when they met with defendant at a Chuck's Corners gas station that had been the exchange point for defendant and Woodworth when transferring custody of their daughter. Woodworth was expecting to pick up her daughter at the time, but defendant had not bought her with him to that location.

Defendant admitted to shooting both victims, but argued that he acted in self-defense. Defendant testified that Woodworth began yelling at him when he told her that he had not brought his daughter. Defendant further testified that Feneis exited his truck and "then him basically screaming at me, he's going to kill me." Defendant testified it was cold and dark and

[1] Defendant's motion to remand was denied. *People v Hullihen*, unpublished order of the Court of Appeals, entered October 3, 2013 (Docket No. 315371).

there were no lights on that portion of the gas station. He said Woodworth and Feneis "were coming towards me a little bit; I was backing up." Defendant testified that Feneis pulled something "shiny" and "black" out of his pocket:

> *Q.* Okay. Once you see Mr. Feneis pull his hands out of his pockets, what do you do?
>
> *A.* At that point, I just – I snapped or something, and instinct took over, and I swear it was a gun –
>
> *Q.* Okay.
>
> *A.* – and I pulled mine –
>
> *Q.* What did you do?
>
> *A.* I pulled my side arm and started shooting.

When asked about the object from the pocket, defendant testified he "didn't know what it was for sure."

Defendant did not remember who he shot or how many bullets he fired. Nor did he recall Woodworth falling to the ground and Feneis running away from him. He testified that when Feneis turned toward him, he "started shooting again" because he "thought [Feneis] still had a gun." When Feneis fell to the ground, defendant testified he backed away to his truck. He then left and headed back to his parents' home, where he told his father he had shot two people who had attacked him. Defendant's father accompanied him when he turned himself in to police.

Evidence was presented at trial that Woodworth was shot eight times, including a total of five gunshot wounds to her face and neck. Woodworth was also shot three times in the torso. Feneis was shot eleven times, including three times in the head and six times in the torso. Defendant's gun's magazine had an eight-round capacity and could carry one round in the chamber.

An eyewitness, Penny Savage, testified that she heard the gunshots and saw defendant shoot a man as he ran toward the store. She then testified that defendant inserted a new magazine in his gun and "very methodically walked up and emptied it" into the man's body lying on the ground. The eyewitness also testified that she did not hear any argument or altercation before the shooting started, and that defendant ran over the woman's body with his truck as he left the scene. Another eyewitness, Carl Asher, testified that he heard the gunshots, did not hear any argument or altercation beforehand, and saw the shooter drive off.

Defendant testified that Feneis had previously threatened him when he dropped off or picked up his daughter with Woodworth. He testified that Feneis said that his friends would come to his house, "get" him, and kill him. Defendant's father testified that he was present when Feneis threatened defendant, including a time when Feneis and his father told defendant something like "this is Osceola County and out here we live way back here in the country in this farm, we can bury your butt and no one will ever find you." Defendant and his father admitted

that defendant had never been assaulted, nor had they seen a weapon displayed, prior to the occasion of the shooting. Defendant testified that he left his daughter at home and drove to Chuck's Corners on the day of the shooting to talk to Woodworth about keeping his daughter longer.

II. JURY INSTRUCTIONS

Defendant argues that the trial court erred in not instructing the jury on voluntary manslaughter, a matter we review for an abuse of discretion. *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Both voluntary and involuntary manslaughter are "necessarily included lesser offenses of murder." *People v Mendoza*, 468 Mich 527, 543; 664 NW2d 685 (2003). Thus, "they are also 'inferior' offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. Whether the evidence "may support a manslaughter conviction requires considering whether a rational jury could conclude that the defendant did not act with malice." *People v Hotschlag*, 471 Mich 1, 15-16 n 8; 684 NW2d 730 (2004).

The elements of voluntary manslaughter are (1) that defendant killed in the heat of passion, (2) that such passion was caused by adequate provocation, and (3) there was not a lapse of time during which a reasonable person could control his passions. *Mendoza*, 468 Mich at 535-536, quoting *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991. The "element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion." *Mendoza*, 468 Mich at 540. A manslaughter killing "must have been the product of an act of passion; it must have been committed in a moment of frenzy or of temporary excitement." *People v Younger*, 380 Mich 678, 681; 158 NW2d 493 (1968). Although provocation separates manslaughter from murder, *Pouncey*, 437 Mich at 388, "provocation is not an element of voluntary manslaughter," but rather provocation "is a circumstance that negates the presence of malice," *Mitchell*, 301 Mich App at 286. Adequate provocation is "that which causes the defendant to act out of passion rather than reason" and "that which would cause a reasonable person to lose control." *Id*. at 287 (citations and quotation marks omitted).

There was testimony that both victims had in the past threatened and berated defendant, and defendant testified that such had occurred prior to the shooting. Defendant testified that he and the victims engaged in a heated verbal exchange when the victims found out that defendant had not brought along his daughter. Generally where "the claimed provocation . . . consists only of words," they "do not constitute adequate provocation." *Pouncey*, 437 Mich at 391. See also *People v Roper*, 296 Mich App 77, 88; 777 NW2d 483 (2009).

However, defendant also testified that the precipitating event here was that Feneis allegedly pulled something "shiny" and "black" out of his pocket after screaming at defendant that he, Feneis, was going to kill defendant. Defendant then began firing at the two victims, not because he had lost control and was being ruled by his passions, but because, in his own words,

"instinct took over." Defendant testified that he could "swear [the black object] was a gun" and that he continued shooting because he thought Feneis still had a gun. He also testified that he was not angry, but was "more scared." Thus, by defendant's own words, his "ability to reason was not blurred by passion; his emotional state did not reach such a level that he was unable to act deliberately." *Pouncey*, 437 Mich at 390. Rather, as the trial court noted, defendant's testimony was that he responded with deadly force to a perceived threat of deadly force. This evidence supported the self-defense instruction that was given to the jury, but did not support an instruction for voluntary manslaughter. In sum, a rational view of the evidence does not support a voluntary manslaughter instruction and thus it was not an abuse of discretion for the trial court to deny the instruction.

III. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor argued facts not in evidence when he stated that Woodworth was shot first. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Issues of misconduct are decided case by case and reviewed in context. *Id*.

Prosecutors are "afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). However, a "prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Id*. at 241. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Id*. at 235 (citations omitted).

The prosecution's comment, challenged by defendant, is based on reasonable inferences from the evidence. In closing argument, the prosecution stated as follows:

> So for whatever reason, he pumps a couple into Gabrielle, I don't know the order here, but he shoots her first, 'cause Donald is taking something out of his pocket, and then Donald takes off running and he's pumping shots into him from over here.

Additionally, during rebuttal argument, the prosecution stated "'Cause you know, you know the first [bullet] through her--it went through her. One of the first ones went through her chest and in the car door."

One testifying witness stated that defendant only fired two shots at Feneis before needing to reload. It can be inferred from this that defendant had previously fired before firing at Feneis. Therefore, it is a reasonable inference that these first shots were fired at Woodworth. Savage testified to hearing what sounded like firecrackers when she exited the main building of the gas station. She heard five shots before entering her van, and four shots thereafter. She then saw the male victim running. He subsequently was shot and fell to the ground. Defendant then fired at him as he lay on the ground. As defendant was driving away, Savage saw him drive over

another victim lying on the ground. It is reasonable to argue from this sequence of events that defendant had fired at Woodworth before pursuing and firing at Feneis. Several shots were fired prior to the shots Savage witnessed directed at Feneis. And another victim (presumably Woodworth) whom Savage did not see being shot at (presumably because the shots were fired before she exited the main building) was observed after the shooting ceased. The prosecution's comments were therefore reasonably related to the record evidence.

Additionally, the prosecution's comment was a proper response to counter defendant's self-defense theory. He did not dwell on the comment, but properly indicated to the jury a plausible order of events based on the evidence and how that would not square with defendant's theory of defense. The prosecution may argue from facts in evidence that defendant is not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

Finally, the court cured any possible prejudice stemming from the comment. The trial court instructed the jury that the "lawyers' statements and arguments are not evidence." The court also specifically instructed the jury that they will "decide what order shots may have occurred" and "how that scenario unfolded." It is for the jury, the court instructed, "to decide those facts based on the evidence, not based on arguments that the attorneys might have made." Given that "jurors are presumed to follow their instructions," any possible prejudice was cured by the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

IV. SENTENCING DEPARTURE

Next, defendant argues the court failed to give specific facts justifying the upward departure in sentencing. There is no preservation requirement because the court imposed a sentence more severe than the guideline recommendation. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

> On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Id.*]

Defendant argues that the trial court's mere reference to defendant's total OV score is insufficiently vague to support a departure.

Objective and verifiable facts justifying a departure must be "external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A trial court may not depart based on actions "already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight." *Id.*, citing MCL 769.34.

Here the court noted that the "195 [OV] points for all the facts surrounding the murders is very high" and that the guidelines "top out at 100 points." The court then reasoned that "literally, 95 of the points assigned for the bad bad things that happened here weren't taken into

account by the guidelines," which justified the "need to at least move up one slot on the sentencing grid," which the court did. The court additionally stated "the objective reason is that many of the things that [defendant] was involved [in] here were not taken into account once he reached the 100 points threshold to score at the highest OV level."

Although the court only generally indicated that "many of the things" were "not taken into account," this does not mean that the court's cited reasons were not objective and verifiable. The trial court noted that defendant's OV score was nearly double the maximum number for guidelines scoring. This was an indication that numerous offense variables had been given inadequate weight and justified the departure. *Abramski*, 257 Mich App at 74; see also *People v Stewart*, 442 Mich 937; 505 NW2d 576 (1993) (stating that a score of 120 OV points, in excess of the 50 point maximum, justified a departure of five years).

Additionally, the trial court justified the extent of the departure. Defendant's scored guidelines range was 225 months to 375 months; the trial court increased this range to 270 months to 450 months, and sentenced defendant to a minimum sentence of 450 months (which equates to 37 and one-half years, or 75 months more than the maximum minimum sentence under the previous guidelines range). The trial court arrived at this new range by using the guidelines and going only one cell beyond the recommended range. The trial court explained its reasoning by stating that the upward departure of one cell on the sentencing grid would take into account the 95 OV points given no weight by the guidelines. The trial court's action essentially treated defendant as though he had been scored an additional 15 to 39 points for prior record variables (PRVs) in order to account for points that were unable to be considered in the scoring of OVs. See MCL 777.61. The trial court's departure was reasoned and proportionate under the circumstances of this case; in fact, the trial court's departure did not fully account for all 95 of the points given inadequate weight by the guidelines. Further, without reference to the guidelines, the trial court's upward departure of 75 months above the maximum minimum sentence under the range was proportionate to the offenses for which defendant was convicted. Defendant murdered the mother of his child and her boyfriend in a public place by shooting them 17 times, a feat only accomplished because he stopped to reload his weapon before firing it again to a point of emptiness. We conclude, under the facts of this case, that the trial court did not abuse its discretion in departing from the sentencing guidelines.

V. ALLEYNE CHALLENGE

Next, defendant argues that the trial court engaged in judicial fact-finding that increased his minimum sentence in violation of *Alleyne v US*, ___ US ___; 133 S Ct 2151; 186 L E 2d 314 (2013). This argument was rejected in *People v Herron*, 303 Mich App 392, ___; ___ NW2d ___ (2013), slip op p 7:

> We hold that judicial fact-finding to score Michigan's guidelines falls within the "'wide discretion'" accorded a sentencing judge "'in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law.'" [*Alleyne v United States*, 570 US ___, ___ n 6; 133 S Ct 2151; 186 L Ed 2d 314 (2013)], quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by

> judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163.

This Court is bound to follow *Herron*. MCR 7.215(J)(1). We accordingly reject defendant's claim of error.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel was ineffective for failing to object to the prosecutor's false argument and in failing to object at sentencing. To prove ineffective assistance, the defendant "must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant bears a heavy burden to overcome the presumption of effective assistance of counsel. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Additionally, there is a "strong presumption that counsel's performance was sound trial strategy." *Id*.

Defendant first contends that counsel was ineffective for failing to object to the prosecution's statement that defendant shot Woodworth first, on the ground that the argument improperly negated defendant's claim of self-defense. Although defense counsel did not object immediately following the prosecution's statement, after the prosecution's closing argument, defense counsel moved for a mistrial, stating:

> Two things, Judge. One, I'm asking for a mistrial, as [the prosecution] is introducing evidence that was not presented.
>
> [The prosecution] in his closing argument indicated that there was a – the first gunshot wound was to one of the victim's torso. Not one single person testified to that.

The trial court declined to grant a mistrial, but indicated that it would give the curative instruction as described in Section III, above.

Defendant does not explain how defense counsel's actions were objectively unreasonable or prejudiced his case, especially in light of the fact that the only way the prosecution could "improperly" negate defendant's claim of self-defense was to argue facts not in evidence, as defendant in fact claims on appeal. Defense counsel's actions in fact resulted in a curative instruction that the jury would have to "decide what order shots may have occurred" and "how that scenario unfolded." Further, the prosecution's comments were proper; if defense counsel had phrased its objection in terms of the prosecution's "improper" negation of defendant's claim of self-defense, it would have been meritless.

Second, defendant asserts that counsel was ineffective at sentencing because he failed to object to judicial fact-finding which allegedly raised the mandatory minimum. However, this

Court specifically rejected such an argument in *Herron*. Counsel cannot be faulted for failing to raise meritless objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra